No. 89-1591

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THOMAS R. SCHWARZ,
Petitioner,

vs.

THE FLORIDA SUPREME COURT,
acting by Justices Raymond Ehrlich, Ben F. Overton, Leander J. Shaw, Rosemary Barkett, Stephen H. Grimes & Gerald Kogan, Dissent by Parker Lee McDonald,
Respondent.

PETITIONER'S SUPPLEMENTAL AND REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

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The within brief is filed by the petitioner pursuant to Rules 15.6[1] and 15.7[2] of the Rules of the Supreme Court.

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[1] Respondent claims for the first time in its brief in opposition that the necessity for specific definition in the delegation of power is strictly a state law matter (Respondent's Brief @ 7) and, on that basis, that the petitioner's second question presented for review has not been properly raised.

[2] This Court's June 4, 1990 decision in *Keller v. State Bar of California*, Case No. 88-1905, was not available to petitioner at the time of his original petition, and constitutes new and relevant authority.

MATTERS NOT AVAILABLE AT TIME OF PETITIONER'S INITIAL FILING

The decision of this Court on June 4, 1990 in *Keller v. State Bar of California*, Case No. 89-1905, had not been rendered when the petition for writ of certiorari in this cause was filed. Although the opinion and decision became available to respondent on June 14, 1990, the latter has nonetheless continued to cite instead to the now-reversed decision of the Supreme Court of California reported at 47 Cal.3d 1152, 767 P.2d 1020, 255 Cal.Rptr. 542 (1989, cert. granted __ U.S. __, 110 S.Ct. 46, 107 L.E.2d 15 (1989)). (Respondent's Brief in Opposition @ pps. 6, 13).

The Florida Supreme Court's decision in *The Florida Bar Re Schwarz*, 552 So.2d 1094 (Fla.1989), review of which is sought herein, similarly relied upon that California state decision in fashioning the scope of its power to compel association of bar licensees in political matters. (Appendix to Petition @ A - 57-58).

In reversing the Supreme Court of California, this Court in its June 4, 1990 decision opined, inter alia:

> "Here the compelled association and integrated bar is justified by the State's interest in regulating the legal profession and improving the quality of legal services, The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity. The difficult question, of course, is to define the latter class of activities.
>
> * * * * * * *
>
> We think these principles are useful guidelines for determining permissible expenditures in the present context as well. Thus, the guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.' *Lathrop*, 367 U.S., at 843 (plurality opinion).

* * * * * * *

> Precisely where the line falls between those State Bar activities in which the officials and members of the Bar are acting essentially as professional advisors to those ultimately charged with the regulation of the legal profession, on the one hand, and those activities having political or ideological coloration which are not reasonably related to the advancement of such goals, on the other, will not always be easy to discern. But the extreme ends of the spectrum are clear: Compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative; at the other end of the spectrum petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the bar or proposing ethical codes for the profession."

This Court's opinion was restricted to the use of mandatory dues. It declined to rule in the first instance upon the claim that forced association "with an organization that engages in political or ideological activities beyond those for which mandatory financial support is justified under the principles of *Lathrop* and *Abood*.." These cases and this Court's *Keller* decision hold that mandatory bar dues may be used for political activity provided, as stated in the *Keller* syllabus:

> "The State Bar's use of petitioner's compulsory dues to finance political and ideological activities with which petitioners disagree violates their First Amendment right of free speech when such expenditures are not necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal services. Pp. 6-14."

Both the ex parte petition below and the instant petition for writ of certiorari raise the question of whether, vel non, forced association with political or ideological activity beyond the scope of mandatory bar dues use — without regard to refund procedures — infringes the petitioner's First Amendment rights of association. Both petitions stake out the concept that unless the delegating power specifically defines the area of permissible activity, restricted as required by

Keller, the intrusion is so pervasive that forced association is rendered constitutionally impermissible.

ARGUMENTS FIRST RAISED IN RESPONDENT'S BRIEF IN OPPOSITION

The action brought by petitioner in the Florida Supreme Court (Appendix to Petition @ A - 1-12) did not concern itself with the refunding of dues or other financial considerations. It sought, instead, definition by the Florida Supreme Court of its claimed powers to compel political association of the petitioner with its agency, the Florida Bar. Such definition was alleged to be required by the Florida Constitution and by the United States Constitution. This was explicitly set out in the ex parte petition to the Florida Supreme Court (Appendix to Petition @ A - 4-5):

> "(12) Petitioner states that:
>
> (a) The constitutional provisions of Articles I, II, and III of the Florida Constitution.
>
> (b) The provisions of Amendments I, IV, and V of the United States Constitution, and
>
> (c) . . . all require that this Court define and limit the political activity delegated to its arm (The Florida Bar)."
>
> * * * * * * *
>
> (18) Your petitioner states that his forced association with this Court's arm in its political activity is regarded as dishonorable as to him and others similarly situated."

At the time (June 4, 1987) the ex parte petition was filed in the Florida Supreme Court, both that court and its arm, the Florida Bar, were operating under the concept that "the administration of justice and advancement of the science of jurisprudence" defined the appropriate scope of forced member association with political activity. The Circuit Court of Appeals for the Eleventh Circuit had in 1986 concluded that this description was "amorphous." *Gibson v. Florida Bar*, 798 F.2d 1564 (CCA 11, 1986).

Pursuant to the ex parte petition and intervening proceedings the Florida Supreme Court, in *The Florida Bar Re Schwarz*, 552 So.2d 1094 (Fla.1989), adopted a new definition of scope of permissible political activity. The United States constitutional limitations affecting that definition were raised and considered. (See, dissent of Justice McDonald, Appendix to Petition @ A-61).

Respondent's position that the Florida Supreme Court's opinion in *The Florida Bar Re Schwarz*, supra, decided the claims of the ex parte petition on the exclusive basis of state law, is both new and specious. The petition references to the 1975 Florida Constitution (Appendix to Petition @ A-4, paragraph 12a) are to the specific and mandatory provisions thereof respecting separation and limitation of powers of the governmental departments. Article I, Section 1 reserves political power not specifically delegated to the people. Article II, Section 3 specifically prohibits one department of government from exercising power delegated to another. Article V sets out the powers of the Judicial Department. None are mentioned in and do not form the basis for the Florida Supreme Court's opinion and decision here sought to be reviewed.

Statements of the legal bases for petitioner's ex parte petition to the Florida Supreme Court were precise and definitive: (1) The specific provisions of the Florida Constitution above noted; (2) Rights under the First and Fifth Amendments to the United States Constitution; and, (3) The general ethical necessities of an impartial judiciary. The impingement of the Florida Supreme Court's activities on petitioner's right to freedom of association was underscored in Paragraph 18 of the ex parte petition. (Appendix to Petition @ A-5).

The opinion and decision of the Florida Supreme Court does not discuss the state constitution provisions. It cleaves to consideration of federal constitutional limitations. In effect, the court holds that "great public interest, special lawyer skills, and the fact that the public reaches the courts" justify "sinful and tyrannical" compelled associa-

tion. The court would remedy this impingement by the "post hoc" refund of dues money to the offended licensees.[3]

The ex parte petition was as noted, filed in the Florida Supreme Court to obtain a definition of the scope and extent of bar licensees' forced association with political ideology. It is clear that absent such definition, a forced political association is open-ended, and it cannot be determined in the first instance if a compelling state interest is involved.

Inasmuch as the Florida Supreme Court, which compels the association, does not itself exercise the power to engage in political activity but, rather, delegates that power to the private citizens who comprise its arm, the Florida Bar, such definition must be sufficiently precise to avoid constitutional limitations on vagueness. The ex parte petition was designed to satisfy both the requirements of specificity and avoidance of definitional vagueness.

The Florida Supreme Court's opinion and decision in *The Florida Bar Re Schwarz*, supra, adopts guidelines in five particular areas which basically track the amendment on this subject proposed by petitioner in the ex parte petition and which are appropriate under *Keller*. By the addition of the three areas set out in the Florida Supreme Court's opinion, however (Appendix to Petition @ A-55), that court reintroduced amorphous, open-ended, subjective criteria which permit undefined intrusion into the bar licensees freedom of political association, contrary to the directions of this Court in *Keller*. It is a return to what the Eleventh Circuit concluded was "amorphous": The "advancement of the science of jurisprudence."

The Florida Supreme Court has left the protection of its licensees' constitutional rights to free association to the circumspection and decision of its Bar management.

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[3] While the question of dues refunds was not raised, petitioner does not believe that such refund procedures can remedy; forced political association under an amorphous grant of power. The Florida procedure is shown in the Appendix to Petition @ A - 31-33. It is clearly a mare's nest.

CONCLUSION

The petition for writ of certiorari, it is submitted, here presents the opportunity for this Court to instruct the Florida Supreme Court — and all other state courts — upon a "more fully developed" and focused record, on the necessity for limiting forced political association of its licensees to matters germane to its agency; mission and on delegating its power with precision, so that parties exercising political power are not making policy decision and those affected can, with the gift of prophecy, determine the legal propriety of the action affecting them.

If the Florida Supreme Court wishes to continue the forced political association of its licensees on an open-ended "amorphous" basis, such forced association is then so pervasive that the integrated bar system must fail for violation of its licensees' First Amendment rights to free association. *Romany v. Colegio de Abogados*, 742 F.2d 32 (CCA 1, 1984); *Schneider v. Colegio de Abogados*, 682 F.Supp. 674 (DPR, 1988).

DATED: June ___, 1990.

Respectfully submitted,

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